

15
RECEIVED
DOCKET FILE COPY ORIGINAL APR 28 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Request of US West Communications)
Inc. for Interconnection Cost Adjustment)
Mechanisms)

CC Docket No. 97-90
CCB/CPD No. 97-12

REPLY COMMENTS OF
GST TELECOM, INC.

Richard Rindler
Douglas Bonner
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

April 28, 1997

No. of Copies rec'd
List A B C D E

024

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. ANY COSTS RECOVERABLE BY US WEST FROM GST SHOULD BE DETERMINED IN THE NEGOTIATION/ ARBITRATION PROCESS AND SPECIFICALLY PROVIDED FOR IN US WEST'S INTERCONNECTION AGREEMENT WITH GST	3
III. THE COSTS IDENTIFIED BY US WEST SHOULD NOT BE RECOVERED FROM CLECS	6
IV. CONCLUSION	10

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Request of US West Communications)	CC Docket No. 97-90
Inc. for Interconnection Cost Adjustment)	CCB/CPD No. 97-12
Mechanisms)	
)	

**REPLY COMMENTS OF
GST TELECOM, INC.**

GST Telecom, Inc. ("GST"), by its counsel, hereby submits these reply comments in connection with the Petition for Declaratory Ruling and Contingent Petition for Preemption ("Petition"), and respectfully states as follows:

I. INTRODUCTION AND SUMMARY

US West Communications Inc. ("US West") has proposed in each of the fourteen states comprising its local telephone service territory an "interconnection cost adjustment mechanism" ("ICAM"). This "mechanism" could impose hundreds of thousands of dollars, per state, per month, in charges on each of the competitive local exchange carriers ("CLECs"), such as GST, attempting to enter US West's markets. These ICAM fees would be imposed in *addition* to the charges already provided in negotiated or arbitrated interconnection agreements. Under U S West's proposal, it would unilaterally set these fees. The Petition filed by several CLECs seeks to consolidate U S West's various state ICAM proceedings for determination here, and have the Commission find that an ICAM may not be utilized to impose costs on CLECs.

The initial comments filed by the ILECs in opposition to the Petition fail to persuasively address a number of important factual, legal, and policy issues. Under the Telecommunications Act of 1996 (“Act”),¹ a new entrant should not pay more than those marginal costs *directly attributable* to the specific interconnection or network elements it seeks from an ILEC.²

U S West’s proposal to create a separate “mechanism,” and the nature of the charges it proposes be included in that “mechanism,” make it likely that this standard will be exceeded. Moreover, in order to develop its business plans, GST needs to be able to project its costs of interconnection. The process of negotiation and/or arbitration of interconnection agreements under section 252 of the Act is designed to do just that. U S West’s proposed ICAM charges would both make GST’s entry into the marketplace more costly and leave the actual costs in doubt. Additionally, dealing with fourteen state commission ICAM proceedings imposes tremendous, unnecessary, additional costs and expenses on new entrants, and raises the risk of state decisions inconsistent with one another and with this Commission’s prior orders under the Act. For these and other reasons, GST strongly supports grant of the relief requested in the Petition.

A number of CLECs (including GST) and affiliated trade associations filed initial comments supporting the Petition.³ In addition, various ILECs filed comments opposing the

¹ Codified at 47 U.S.C. ____ *et. seq.* (hereinafter “Act”). All section references hereafter will be to the Act as cited here unless otherwise stated.

² See, e.g., FCC Interconnection Order at ¶ 691.

³ See, e.g., Comments of Sprint Corporation (“Sprint Comments”) (these and all comments cited herein and below are dated April 3, 1997, unless otherwise noted); Comments of

Petition.⁴ GST supports the arguments made by the CLECs, and will not repeat those positions here. Certain positions taken by the ILECs in their initial comments suggest the need for a limited specific response. As more fully explained below, GST believes the Commission should find that:

- *Any* costs payable by GST to US West should be in the interconnection agreement that results from the negotiation and arbitration process under the Act (“Interconnection Agreement”), and not recovered in part by a separate, uncertain and after the fact interconnection charge docket; and
- The ICAM costs described by US West should not be recovered from CLECs at all.

II. ANY COSTS RECOVERABLE BY US WEST FROM GST SHOULD BE DETERMINED IN THE NEGOTIATION/ ARBITRATION PROCESS AND SPECIFICALLY PROVIDED FOR IN US WEST’S INTERCONNECTION AGREEMENT WITH GST

The ILECs focus in large part on the argument that they are entitled to recover the kinds of costs claimed by US West, and that such costs should be determined by state commissions.⁵ As a matter of law, and for important policy reasons, *any* charges purportedly recoverable from

American Communications Services, Inc.; Comments of Worldcom, Inc.; Comments in Support by the Association for Local Telecommunications Services; Comments of the Competitive Telecommunications Association, and Comments of the Telecommunications Resellers Association.

⁴ See, e.g., Opposition of GTE Service Corporation to Petition for Declaratory Ruling and Contingent Petition for Preemption (“GTE Comments”); Comments of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (“Southwestern Comments”); Joint Comments of Bell Atlantic and NYNEX (“Bell Atlantic Comments”).

⁵ See, e.g., GTE Comments at 10; Southwestern Comments at 2 and Bell Atlantic Comments at 1.

GST as a result of the Act should be expressly determined in the negotiation and arbitration process and specifically provided for in the parties' Interconnection Agreement. If such costs are not provided there, they should not be recovered at all. A separate "ICAM" mechanism as proposed by US West cannot be justified.

A plain reading of the Act supports this view. Congress has prescribed a process for determining an "agreement" containing "particular terms and conditions," including interconnection rates. *See*, §§251(c)(1) and 251(c)(2)(D). "The agreement *shall* contain a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." §252(a)(1) (emphasis added). The process of reaching an agreement and establishing all such charges is supposed to be prompt -- that is why Congress imposed a nine month deadline to resolve *any* unresolved issues. §252 (b)(4)(C). These same provisions further require the agreement to be comprehensive and complete, so that the "particular terms and conditions" for interconnection are identified and *all* issues are settled. *Id.*

The underlying policy of the Act requires that all charges to be imposed on GST be determined fully and to the extent possible, up front. In order to develop business plans, GST needs to know with some precision and certainty what the cost of doing business will be.⁶ Congress imposed tight deadlines on the process of negotiation and arbitration in sections 251 and 252 precisely because it wanted prompt implementation of its mandate for introducing

⁶ This approach fully addresses the ILECs' alleged concern with ensuring that changes provide proper market signals to new entrants. *See, e.g.*, GTE Comments at 9.

competition into the local exchange market. Congress knew that the costs of entry had to be established before competitors would commit the necessary resources.

Clearly, Congress' goal would be undermined if GST has to pay *any* charges twice. This Commission has directed state commissions to "take steps to ensure that incumbent LECs do not recover non-recurring costs twice."⁷ The most practical and effective means to avoid such a potential double recovery is to have *all* charges determined in one proceeding.

Separate proceedings also have the effect of undermining the vitality of the negotiation and arbitration process. If separate ICAM proceedings are authorized, a CLEC having negotiated in good faith and having devoted significant resources to that process in the expectation of developing a set of costs upon which it can rely could face a new, separate set of proceedings which could significantly alter its cost assumptions.

A second Congressional policy is jeopardized by state ICAM proceedings. Congress limited the ILECs to "just and reasonable" charges for interconnection, because it wanted to guarantee that they could not exploit their position as owners of monopoly local networks by charging supra-competitive rates. In its First Report and Order, the Commission determined the appropriate methodology for setting the interconnection charges, and rejected ILEC arguments for reimbursement of additional charges on the ground that additional reimbursement would lead to supra-competitive rates. If a state ICAM proceeding allowed the ILEC to impose additional charges, it would conflict with these determinations. Because such charges would be more than

⁷ FCC Order at ¶ 750.

the “just and reasonable” rates determined under § § 251 and 252, they would be subject to preemption under § 251(d)(3) because they are not “consistent with the requirements of this section” and “substantially prevent implementation of . . . the purposes of [the Act].”

III. THE COSTS IDENTIFIED BY US WEST SHOULD NOT BE RECOVERED FROM CLECS

GST clearly supports the views expressed by many commenters that the Act by its terms does not permit recovery of the ICAM charges sought by US West and the ILECs. Indeed, by US West’s own original definition, the kinds of costs it seeks to recover are not permitted under the Act, and not recovered in Interconnection Charges.⁸ Some of the ILECs seem to agree.⁹

The kinds of charges sought by US West, as they have been articulated, are not direct costs of interconnection which would be covered in interconnection charges in the Interconnection Agreement. Rather, as US West states, these ICAM costs are US West’s costs of complying with a federal statute. The fact that US West alleges the existence of such short term costs, however, in no way provides an entitlement to recover them from the CLECs.¹⁰ In fact,

⁸ See, e.g., Application of US West Communications, Inc. for the Interconnection Cost Adjustment Mechanism, Filed with the Public Service Commission of Utah on January 3, 1997, Docket No. 97-049 (“Utah Petition”) at 2. US West has subsequently backed off of this position, now claiming support in the FCC Interconnection Order for the recovery of these charges. US West Opposition to Petition for Declaratory Ruling and Contingent Petition for Preemption, filed in this docket, at 4.

⁹ See Southwestern Comments at 7 (“As these specific sections do not provide a means for ILECs to recover their start up costs, *alternative* cost recovery methods must be explored.”) (emphasis added).

¹⁰ As has been noted in this docket, the CLECs also have such costs. See, e.g., Sprint Comments at 7.

while the Eighth Circuit's Order staying the pricing provisions of the Interconnection Order noted a concern over ILECs "suffering economic losses beyond those inherent in the transition from a monopolistic market to a competitive one,"¹¹ it implicitly acknowledges that to the extent there are costs inherent in the transition" to a competitive market, they are *not* necessarily recoverable.

Many of the ILECs seek to bolster their argument for imposing these costs by taking the position asserted by GTE that "the modifications necessary for CLECs to use ILEC networks will only benefit CLEC customers." GTE Comments at 14. This assumption demonstrates a fundamental misunderstanding of the nature of these costs and the context in which they are being incurred. These ICAM costs are, in the words of the Eighth Circuit, the kinds of costs "inherent in the transition from a monopolistic market to a competitive one." They flow from a broad and multi-faceted statute which confers an array of burdens *and* benefits on many parties, including the ILECs. Opening up the local telephone market to competition is only one of a number of important features of the Act.

The ILECs' fundamental factual assumption -- that the result of the statute will be a net cost to them -- is wholly speculative and unproven. Experience in opening up long distance markets to competition demonstrates that incumbent carriers can lose market share and *still* end up increasing revenues, because one effect of vigorous competition is to stimulate demand for products and services. In short, the "pie" is expanded. It is certainly possible that such a result

¹¹ *Order Granting Stay Pending Judicial Review*, Eighth Circuit, filed October 15, 1996, at 18.

could occur in the local markets. Further, and more dramatically, the Act opens up to GTE and the RBOCs long distance markets previously closed to them. This will result in significant new opportunities for them to substantially increase revenues. Accordingly, the net result of the Act for ILECs could well be positive.¹² Whether this proves true or not, it is inescapable that it is speculative and premature to conclude that the ILECs' short term costs for "complying with this statute" will not be fully recovered by opportunities conferred upon them by that very same statute.

Flailing as they must for a basis to impose these short term expenses on the CLECs, the ILECs in unison resort to a constitutional "takings" argument in response to the Petition.¹³ This strained theory rests upon the questionable factual assumption that "the Act requires ILECs to expend significant sums to provide the new services and access necessary for [] competition."¹⁴ The arguments at best rest upon an unarticulated and unsupported theory of "indirect" taking.

The short of the matter is that the ILECs have no valid "taking" claim that would justify imposition of additional charges on CLECs beyond those contained in Interconnection Agreements. To the extent the ILECs seek to assert such a claim, it must be raised not here, but

¹² It has been suggested that the ILECs ought to credit or net out the direct costs incurred by CLECs in complying with the Act against such costs claimed by ILECs. While clearly implausible, the ILEC argument suggests that the ILECs should agree to reimburse CLECs any substantial profits the ILECs (or their affiliates) may earn pursuant to the mandates of this new federal statute.

¹³ See, e.g., GTE Comments at 13; Bell Atlantic Comments at 4.

¹⁴ GTE Comments at 14.

in the United States Court of Claims.¹⁵ While the full extent of the Constitutional issues, therefore, will be developed in other forums, a review of basic principles reveals that the ILECs' "taking" claim fails. Constitutional law traditionally recognizes two kinds of "takings," physical and regulatory. The kinds of issues now raised by the ILECs do not fall into either category.

US West's argument in connection with its ICAM filing rests primarily on a "regulatory taking" theory. It is simply factually incorrect to assert a physical taking akin to the "Government [seizure of] the Youngstown Steel Plant," a position taken by GTE.¹⁶ Such a direct and physical "seizure" is not found in the Act.¹⁷

The theory of a "regulatory taking" is based on the principle that a utility is protected from being limited to a charge for their property serving the public which is "so unjust as to be confiscatory." *Duquesne Light Company v. Barasch*, 488 U.S. 299, 306, 109 S.Ct. 609, 615,

¹⁵ U S West appears well aware of the fact as it has filed such a claim. Such a claim is squarely governed by Ruckelshaus v. Monsanto, 467 U.S. 986 (1984), where Monsanto challenged the adequacy of compensation available to it for an alleged taking under a federal regulatory statute. The Supreme Court held that Monsanto's challenge to the adequacy of the compensation available under the statute was not ripe, because Monsanto could seek whatever additional compensation might be constitutionally required by suit against the federal government under the Tucker Act. 467 U.S. at 1016-20.

¹⁶ GTE Comments at 15.

¹⁷ Analogous precedent also does not support a claim of any "indirect" physical taking. See United States v. Ohio Oil Co., 234 U.S. 548, 561 (1914) ("The whole case is that the appellees, if they carry, must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view.")

102 L.Ed.2d 646, (1989).¹⁸ “It is not the theory but the impact of the rate order which counts. If the *total effect* of the rate order cannot be said to be unjust and unreasonable, judicial inquiry...is at an end.” *Federal Power Commission et al. v. Hope Natural Gas Co., et al.*, 320 U.S. 591, 602, 64 S.Ct. 281, 287 (1944) (emphasis added). It is simply impossible at this time for the ILECs to make any showing, and obviously they cannot make a “convincing showing” that the “total effect” of the Act will constitute a confiscation of their property. Indeed, the ILECs may come out as winners under the Act, making a mockery of any claim regarding a taking.¹⁹

IV. CONCLUSION


Important policy and legal reasons compel this Commission to grant the relief requested in the Petition. Permitting separate ICAM proceedings will undercut the vitality of the negotiation and arbitration process and ultimately thwart competition. Further, the kinds of costs sought by US West are not properly recoverable from CLECs. They are rather the results of a broad federal statute which creates burdens and benefits for ILECs, and CLECs the net effect of

¹⁸ “A rate is too low if it is ‘so unjust as to destroy the value of [the] property for all the purposes for which it was acquired,’ and in so doing ‘practically deprive[s] the owner of property without due process of law.’” *Id.*, citing *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896).

¹⁹ Given their proclivities to litigate these issues in the state commission arbitrations, the U.S. District Court appeals from those proceedings, and the Eighth Circuit, among others, it appears that the ILECs are getting all of the “due process” that the courts and commissions of this country are prepared to muster.

which will not be known for some time. There is no valid "takings" claim here. In any event, such a claim would be properly directed against the federal government in the U.S. Court of Claims and not against GST and other CLECs in fourteen different state public utility commissions. The Petition should be granted.

Respectfully submitted,



Richard Rindler
Douglas Bonner
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 424- 7500
Telecopy: (202) 424-7645

Dated: April 28, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 1997, copies of Reply Comments of GST Teecom, Inc. were served by first class mail, postage prepaid, on the following:

James D. Schlichting *
Chief, Competitive Pricing
Division
Federal Communications
Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

Mitchell F. Brecher
Robert E. Stup, Jr.
Fleischman & Walsh
Suite 600
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

Casey D. Mahon
McLeodUSA Telecommunications
Services, Inc.
Suite 500
221 Third Avenue, S.E.
Cedar Rapids, IA 52401

Daniel M. Waggoner
Richard L. Cys
Davis Wright Tremaine, L.L.P.
Suite 700
1155 Connecticut Avenue, N.W.
Washington, D.C. 20036

J. Scott Bonney
Vice President - Regulatory and
External Affairs
Nextlink Communications
155 108th Avenue, N.E.
8th Floor
Bellevue, WA 98004

Robert B. McKenna
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036

Leon M. Kestenbaum
Jay C. Keithley
Norina t. Moy
1850 M Street, N.W.
Suite 1110
Washington, D.C. 20036

Brad E. Mutschelknaus
Danny E. Adams
John J. Heitmann
Kelley Drye & Warren
1200 19th Street
Suite 500
Washington, D.C. 20036

Riley M. Murphy
Charles H.N. Hallenbach
James C. Falvey
American Communications
Services, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Laura H. Phillips
Christopher D. Libertelli
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

David N. Porter
Vice President, Government Affairs
WorldCom, Inc.
1120 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

R. Michael Senkowski
Robert J. Butler
Suzanne Yelen
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Southwestern Bell Telephone Co.
One Bell Center, Suite 3518
St. Louis, MO 63101

Marlin D. Ard
Randall E. Cape
John W. Bogy
Southwestern Bell Telephone Co.
140 New Montgomery St.
San Francisco, CA 94105

Robert A. Mazer
Albert Shuldiner
Vinson & Elkins
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Lawrence W. Katz
Bell Atlantic Telephone Companies
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

William J. Balcerski
NYNEX Telephone Companies
1095 Avenue of the Americas
New York, New York 10036


Richard J. Metzger
Association for Local
Telecommunications Services
1200 19th St., N.W.
Suite 560
Washington, D.C.

Genevieve Morelli
Executive Vice President and
General Counsel
Competitive Telecommunications
Association
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Peter Arth, Jr.
Lionel B. Wilson
Mary Mack Adu
People of the State of California and
Public Utilities Commission of CA
505 Van Ness Avenue
San Francisco, CA 94102

International Transcription Service *
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037


Richard M. Rindler

*** Via Hand Delivery**